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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE DE JESUS PEREZ GONZALEZ,

Defendant and Appellant.

A131631

(San Mateo County
Super. Ct. No. SC069249A)

Defendant Jose de Jesus Perez Gonzalez was convicted of one count of attempted murder, two counts of burglary, and other crimes, in connection with two separate burglaries, one of which involved a brutal attack on defendant's landlady. He argues that insufficient evidence supports his attempted murder conviction, and that the trial court erred when it ordered him to pay \$50,000 in restitution to the victims of one of the burglaries. The Attorney General concedes that there is an insufficient evidentiary basis for the restitution award. We accept respondent's concession as to the restitution order, and remand the matter for further proceedings. We otherwise affirm the judgment.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

*A. Pacifica Burglary.*¹

On December 21, 2007, the owner of an automobile body repair shop in San Francisco threw a Christmas luncheon for his employees. The repair shop's office manager, who was dating defendant at the time, called the owner's Pacifica home multiple times that day to ask when the owner's family members would be away from their home to attend the party, then passed that information on to defendant. While all family members who lived in the Pacifica home attended the party, defendant burglarized the home. Police later recovered items taken from the Pacifica home in defendant's residence, as well as in his vehicle.

B. Attack on Defendant's Landlady.

Defendant's 78-year-old landlady, a widow, lived in a house in Daly City. She was blind in one eye, but was mobile and able to move about her home, participate in social events, and walk with her friends once a week. The landlady had a security alarm system that she kept turned on when she was in the house, and she did not open the door for people she did not know. Although defendant and his roommates usually mailed their rent payments to the landlady, defendant had met his landlady in person, and could identify her by sight.

On January 12, 2008, the landlady received a "strange" telephone call from a woman, later determined to be the repair shop office manager who defendant was dating, informing the landlady that she would be receiving a package from South America later in the day, and asking when she would be at home to accept delivery. The office manager later testified that she called the landlady at defendant's request, that defendant directed her to pose as a delivery company representative, and that defendant dialed the

¹ Because defendant does not challenge the sufficiency of the evidence supporting his convictions in connection with the Pacifica burglary, we provide only a brief summary of the relevant facts.

telephone number. The landlady told the office manager that she would not be at home after 3:00 p.m., when she planned to attend church, and the office manager passed this information on to defendant. The landlady called two of her sons in the early afternoon and told them that she had not ordered a package, and that she planned to close the drapes, pretend she was not home, and not answer her door.

At trial, witnesses gave different accounts of the brutal attack that the landlady suffered later that day. Juan Cuellar, defendant's acquaintance, testified that defendant called him that day, said that he was ready for a home robbery, then drove his truck to pick up Cuellar between 1:00 and 2:00 p.m. Another man, who Cuellar had never met (and who authorities never identified), was in the truck with defendant. Cuellar described the unidentified man as being "Latin race but white skin[ned]." Cuellar testified that he did not want to participate in the burglary, but did so after defendant offered him money.

Cuellar drove the three men to the landlady's house, and parked in her driveway. Cuellar saw defendant and his partner put on blue gloves, then take tools and leave the vehicle. One of the men also took a backpack out of the truck. According to Cuellar, he remained in his vehicle the entire five to ten minutes that defendant and his companion were gone. When they returned to Cuellar's truck, they were running, and "both of them were arguing with [*sic*] a piece of tool that had blood on it." Cuellar testified that he heard defendant and his companion say that "they had made a mistake, and they had no reason to do it." He also testified that defendant claimed he was concerned that his landlady would recognize him, and "that's why he did it." Cuellar saw defendant holding a flat piece of metal that had blood on it. During the drive back to Cuellar's home, defendant and his companion argued about the fact that they had forgotten a backpack at the landlady's house. Defendant and his companion left Cuellar after they returned to his house.²

² Cuellar later pleaded no contest to one count of residential burglary (Pen. Code, § 460, subd. (a)) for his role the crime, in exchange for testifying in defendant's case. He was sentenced to two years in prison. Other charges against him were dropped, pursuant to the plea deal.

Defendant testified on his own behalf at trial, and claimed that it was Cuellar's idea to burglarize the landlady's house. He acknowledged that he asked the woman he was dating to place a call to his landlady, to see when the landlady would be away from her house. Later that day, he picked up Cuellar at a bank parking lot. Cuellar was with a friend who defendant had not previously met. Defendant described Cuellar's friend as a "white" man, between 18 and 20 years old.

Cuellar drove his friend and defendant to the landlady's house, stopping at a shopping center along the way to remove the truck's license plates. Defendant called the landlady's house from the shopping center, but no one answered the phone. They parked at the landlady's house at around 3:20 p.m. Defendant then went to the front door and rang the doorbell multiple times, but no one answered the door. When he walked down the stairs, Cuellar and his friend already had gone through the yard to a different entrance.

Defendant waited outside for a few minutes, then walked to the back of the house and saw that a door was open. He entered the house, and heard a scream as he walked up the stairs. Defendant continued up the stairs, and saw Cuellar on top of the landlady, with Cuellar's friend trying to pull him off. Defendant also tried to pull Cuellar away from his landlady. Defendant testified that he did not personally hit his landlady, and that he did not know that she was going to be at home. At some point, either Cuellar or his friend said "let's go," and they left. An alarm sounded as they were leaving.³

While the three men were driving away, Cuellar and his friend argued about a backpack that was left behind. Defendant testified that the backpack did not belong to him, and that he saw Cuellar's friend carry it into the landlady's house. Cuellar's friend told Cuellar that Cuellar "should not have hit the woman," according to defendant.

A police officer was dispatched to the home as a result of the home's alarm system, and found the landlady to be a "bloody mess." She was bleeding, it appeared that she had been scalped, her head was swollen, both of her eyes were swollen almost

³ The suspected point of entry into the home was a sliding door that apparently was not connected to the home's alarm system.

completely shut, she was using her hands to hold her jaw together, and she was unable to speak. There was blood on the hallway floor and walls, in the living room, and in the bathroom sink and on the floor, and the landlady's bedroom had a "massive" amount of blood, along with "chunks" of human tissue, on the floor.

The responding officer asked the landlady who had beaten her. Although the landlady could barely speak, she told the officer it was a "white male," who was possibly still inside her home. The officer asked several questions, including whether she knew her assailant, but the landlady was unable to answer because of her injuries. She was taken to the hospital, where she was listed in critical condition, and was unable to provide a statement regarding the crime.⁴

Police recovered a backpack near the landlady's bedroom. It contained a bloody crowbar, a pair of gloves, and items connected to the burglary of the Pacifica home.

C. Legal Proceedings.

Defendant waived his right to a jury trial. Following a court trial, defendant was convicted of the following charged crimes, in connection with the attack on his landlady: attempted murder (Pen. Code, §§ 187, subd. (a), 664⁵—count 1), a serious offense as defined by section 1192.7, subdivision (c)(9); burglary of an inhabited dwelling (§ 460, subd (a)—count 2), a violent felony because the victim was present during the burglary (§ 667.5, subd. (c)(21)); assault with a deadly weapon, a crowbar (§ 245, subd. (a)(1)—count 4), a serious offense as defined by section 1192.7, subdivision (c)(31); willful infliction of unjustifiable physical pain on an elder (§ 368, subd. (b)(1)—count 5), with an allegation that the victim was older than 70 (§ 368, subd. (b)(2)(B)); and putting out

⁴ The landlady was hospitalized for more than a month, during which time she underwent multiple surgeries to treat her injuries and to perform facial reconstruction. She was then transferred to a care facility in Pacifica, where she underwent therapy for about two-and-a-half months, and was later transferred to a small convalescent home, where she has remained ever since. She uses a wheelchair, has difficulty walking, is now totally blind, has scars, and one side of her face appears to be "caved in by her eye." Her face was so badly beaten that there is "a constant oozing of pus" from the eye that previously had vision.

⁵ All statutory references are to the Penal Code.

the victim's eye (§ 203—count 8), a serious offense as defined by section 1192.7, subdivision (c)(2), mayhem.⁶ In connection with the burglary of the Pacifica home, defendant was convicted of burglary of an inhabited dwelling (§ 460, subd. (a)—count 6), a serious offense as defined by section 1192.7 subdivision (c)(18); and receiving stolen property (§ 496, subd. (a)—count 7).

When announcing the verdicts, the trial court observed that there was no direct evidence that defendant was the one who beat his landlady, and on that basis found that there was a reasonable doubt as to the truth of the charged allegations that he personally inflicted injury on her (*ante*, fn. 6). The court pointed to the evidence that the landlady said a “white male” had attacked her, and reasoned that she would have specifically identified defendant, who she knew, if he had been the person who hit her. The court found defendant guilty of attempted murder as an aider and abettor, reasoning that “the attempted murder was reasonably foreseeable by the participants, including the defendant, because the defendant knew that [his landlady] was an elderly, live-at-home widow, and should have known that it's entirely possible for a person like [her] to not open the door.”

Defendant was sentenced to 11 years, eight months in prison, calculated as follows: the upper term of nine years on the attempted murder count, and consecutive terms of 16 months (one-third the midterm) on the two burglary counts, with sentences on the other counts stayed (§ 654). This timely appeal followed.

II. DISCUSSION

A. Substantial Evidence Supports Attempted Murder Conviction.

Defendant argues that his attempted murder conviction is not supported by substantial evidence. “Substantial evidence is evidence that is ‘ ‘reasonable in nature,

⁶ Defendant also was charged with attempted residential robbery (§§ 212.5, subd. (a), 664—count 3); however, the trial court found defendant not guilty on this count. The court also found not true various allegations included in the information, focused on whether he personally inflicted injury on his landlady.

credible, and of solid value.” ’ [Citation.] ‘In reviewing the sufficiency of the evidence, we must determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” ’ [Citation.] We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.] ‘The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on “ ‘isolated bits of evidence.’ ” [Citation.]’ [Citation.]” (*People v. Medina* (2009) 46 Cal.4th 913, 919 (*Medina*), original italics.)

“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.” (*People v. Lee* (2003) 31 Cal.4th 613, 623.) In finding defendant guilty as an aider and abettor, the court focused on the foreseeability of the attempted murder, an indication that it was relying on the natural and probable consequences doctrine, as summarized in *Medina, supra*, 46 Cal.4th at page 920: “ ‘A person who knowingly aids and abets criminal conduct is guilty of not only [of] the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]’ [Citation.] Liability under the natural and probable consequences doctrine ‘is measured by whether a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.’ [Citation.]” (Original italics.)

“ ‘[A]lthough variations in phrasing are found in decisions addressing the doctrine—“probable and natural,” “natural and reasonable,” and “reasonably foreseeable”—the ultimate factual question is one of foreseeability.’ [Citation.] Thus, ‘ “[a] natural and probable consequence is a foreseeable consequence”. . . .’ (*Ibid.*) But ‘to be reasonably foreseeable “[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . .’

[Citation.]’ [Citation.] A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case (*ibid.*) and is a factual issue to be resolved by the [trier of fact]. [Citations.]” (*Medina, supra*, 46 Cal.4th at p. 920.) “[M]urder is generally found to be a reasonably foreseeable result of a plan to commit robbery and/or burglary despite its contingent and less than certain potential.” (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530 (*Nguyen*).)

“To convict a defendant of a nontarget crime as an accomplice under the ‘natural and probable consequences’ doctrine, the [trier of fact] must find that, with knowledge of the perpetrator’s unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The [trier of fact] must also find that the defendant’s confederate committed an offense other than the target crime, and that the nontarget offense was a ‘natural and probable consequence’ of the target crime that the defendant assisted or encouraged.” (*People v. Prettyman* (1996) 14 Cal.4th 248, 254.) “ ‘[A] defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by [the trier of fact].’ [Citation.]” (*Id.* at p. 261.)

There is overwhelming evidence that defendant intended to facilitate the commission of the target crime of burglary, as he provided information about where his landlady lived, knowing that a burglary was planned, and took steps to find out whether the victim would be home, thus making breaking into the residence easier. As the trial court acknowledged, a reasonable inference to be drawn from the evidence is that defendant and his companions did not expect the victim to be at home when they arrived to commit burglary. However, “[a] person may aid and abet a criminal offense without

having agreed to do so prior to the act.” (*Nguyen, supra*, 21 Cal.App.4th at p. 531.) Because “any person concerned in the commission of a crime, however slight that concern may be, is liable as a principal in the crime [citations], it follows that an aider and abettor will be responsible for a collateral offense if at any time that he does something that directly or indirectly aids or encourages the primary actor in the commission of a crime, it is reasonably foreseeable that a collateral offense may result. In other words, in determining whether a collateral criminal offense was reasonably foreseeable to a participant in a criminal endeavor, consideration is not restricted to the circumstances prevailing prior to or at the commencement of the endeavor, but must include all of the circumstances leading up to the last act by which the participant directly or indirectly aided or encouraged the principal actor in the commission of the crime. [Citation.]” (*Id.* at p. 532, fn. omitted.)

In considering all the factual circumstances of this particular case, we find ample evidence to support a theory that the attempted murder of defendant’s landlady was a possible consequence of the target crime of burglary, which might reasonably have been contemplated. (*Medina, supra*, 46 Cal.4th at p. 920.) Defendant personally knew his landlady, and thus was aware that she was an elderly woman who would be virtually defenseless against three men entering her home. This was a location where she would be “ ‘particularly weak and vulnerable,’ ” whereas the three men would be “ ‘correspondingly secure.’ ” (*Nguyen, supra*, 21 Cal.App.4th at p. 533.) Although steps were taken to ensure that the house was unoccupied, we agree with the trial court that it was reasonably foreseeable that the landlady would in fact be at home, but would not answer the door. Defendant himself claimed that he participated in the crime because of Cuellar’s “threat,” and that he was under Cuellar’s “manipulation,” an indication that he believed Cuellar to be capable of violence. Although there was conflicting evidence over who brought a backpack into the landlady’s house, it was later found to contain indicia of the Pacifica burglary, along with a bloody crowbar, evidence that supports an inference that defendant was aware that an item that could be used as a deadly weapon would be available during the burglary.

Defendant points to the absence of any direct evidence of Cuellar's intent to kill, and claims (without citation to legal authority) that Cuellar's actions "[c]learly" were "a true reflex or startled response at being surprised by [the landlady's] presence that negated any intent to kill on his part." In light of the undisputed evidence regarding the severity of the landlady's beating with a crowbar, we disagree with this characterization of the record. (E.g., *People v. Arias* (1996) 13 Cal.4th 92, 162 [intent to kill can be inferred where there is purposeful use of lethal weapon with lethal force].) Substantial evidence supports defendant's conviction of attempted murder under the natural and probable consequences doctrine.

B. Restitution Order.

Defendant next argues that the trial court erred in ordering that he pay \$50,000 in restitution to the victims of the Pacifica burglary, the amount recommended by the probation department, based on an inventory list provided by one of the homeowners. (§ 1202.4, subd. (f).) Defendant did not object at sentencing to the recommended award. (Cf. *People v. Collins* (2003) 111 Cal.App.4th 726, 734 [where probation report discusses victim's loss and recommends amount of restitution, defendant must come forward with contrary information to challenge amount].)

The inventory list referenced in the probation report was not included in the record on appeal, and defendant requested that the record be augmented to include the list. This court has received from the trial court an undated, 14-page Pacifica police department "victim property form" listing more than 100 stolen items. With the exception of \$1,800 in cash, no value is listed for any of the stolen items. At oral argument in this court, respondent's counsel stated that it was his understanding that the homeowners provided a list to the trial court containing additional specific valuations, but that this more detailed list cannot be located.

The Attorney General concedes that the appellate record contains insufficient evidentiary support for the award of \$50,000 to the victims of the Pacifica burglary, and "reluctantly" agrees that the matter should be remanded to the trial court for further proceedings. We accept the concession. We therefore need not consider defendant's

alternative argument, that if his argument was forfeited by his trial attorney's failure to object to the probation report and failure to request a hearing, he received ineffective assistance of counsel.

III.
DISPOSITION

The restitution award in favor of the victims of the Pacifica burglary is reversed, and the matter is remanded to the trial court for a new hearing to determine the amount of restitution. In all other respects, the judgment is affirmed.

Sepulveda, J.*

We concur:

Ruvolo, P.J.

Reardon, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.